Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CASE NUMBER 79-1869

S & M MATERIALS COMPANY,

Petitioner

vs.

SOUTHERN STONE COMPANY, INC.,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Citations ii

(a) Opinions Below 1

(b) Jurisdiction 1

(c) Statutes and Regulations 2

(d) Questions Presented for Review 2

(e) Statement of the Case 3

(f) Summary of Argument 4

(g) Argument and Citation of Authority 5

(h) Conclusion 8

(i) Certificate of Service 10

TABLE OF CITATIONS

CASES

Cliff Food Stores, Inc. v. Kroger, Inc.
417 F2d 203 (1969, 5th Cir.) 7, 9

Gulf Oil Corporation v. Copp Paving Co.,
419 U. S. 186, 42 L.Ed.2d 378, 95 S.Ct. 392 ..... 6, 11

Hiram Walker, Inc. v. A & S Tropical, Inc.,
407 F.2d 4 (1969, 5th Cir.) 7, 9

Littlejohn v. Shell Oil Co.,
483 F.2d 1140 (1973, 5th Cir.) 7, 9

S & M Materials Co. v. Southern Stone Company, Inc.,
612 F.2d 198, Division (4) Page 3397 8

Standard Oil Company v. T.T.C.,
340 U.S. 231, 95 L.Ed.2d 44 (1951) 9, 10, 11

Walker Oil Co. v. Hudson Oil Co.,
414 F.2d 588 (1969, 5th Cir.) 7, 9

STATUTES AND REGULATIONS

Robinson-Patman Act §2(a)
15 U.S.C.A. §13(1)..... 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979, NO. 79-1869

S & M MATERIALS COMPANY, PETITIONER

VS.

SOUTHERN STONE COMPANY, INC., RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 40 of the Rules of the Supreme Court of the United States, the following information is provided:

(a)
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 612 F.2d 198 (5th Cir. 1980).

(b)
JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari, and the jurisdiction of this Court is not challenged by Respondent.

(c)

STATUTES AND REGULATIONS

This petition involves the following statute: Section 2(a) of the Robinson-Patman Act (15 U.S.C.A. §13[a])

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

(d)

QUESTIONS PRESENTED FOR REVIEW

1.

Should the Petition for Writ of Certiorari be denied, or summarily dismissed, for Petitioner's failure either in its statement of the case of elsewhere to specify any facts or combination of facts which constitutes a "transaction" which crosses a state line within the meaning of the Robinson-Patman Act so as to give the District Court jurisdiction over its claim?

2.

In order for the District Court to have subject matter jurisdiction of Petitioner's claim must the the Respondent have made sales of dolemite rock, the undisputed discriminatory commodity, in interstate commerce?

3.

If question 2. above is answered in the affirmative, must the sales cross state lines to be interstate commerce?

4.

If questions 2. and 3. are answered in the affirmative, must the dolemite rock which is the subject of the "transactions" cross a state line?

(e)

STATEMENT OF THE CASE

Petitioner in presenting the questions for review to this Court says that it is sufficient to show subject matter jurisdiction under the Robinson-Patman Act that at least one of the two transactions which, when compared, generate a discrimination crosses a state line. Respondent agrees with this abstract principle but denies its application here. In taking that position Petitioner implies that there was presented for consideration by the District Court and the Fifth Circuit Court of Appeals facts or circumstances as to transactions in commerce which violated the Robinson-Patman Act. Respondent's uncontradicted summary judgment evidence demonstrated the contrary.

Let's examine the facts, or the combination of facts, to see if any constitute a "transaction" which crosses a state line within the meaning of the Robinson-Patman Act.

Respondent mines dolemite rock from a rock quarry in Lee County, Alabama. The stone is thereafter processed at the same location by crushing into various sizes. The only commercial use of dolemite rock known to Respondent is for use in the construction business such as roads, driveways, etc. and for further processing dolemite rock into agricultural lime for soil fertilization purposes (R. 64-67).

All sales of dolemite rock by Respondent are made at its quarry in Auburn, Alabama, where it is loaded on the trucks of

purchasers, including Petitioner. Respondent makes no deliveries of dolemite rock. At no time during the period in question did Respondent make any sale of, or transport for sale, dolemite rock from within the State of Alabama across any state line into any other state. To Respondent's knowledge no purchaser of dolemite limestone transported this commodity in interstate commerce. All dolemite rock purchased by Petitioner was transported in Petitioner's trucks or in those trucks provided by Petitioner from Auburn, Alabama to the Petitioner's place of business in Seale, Alabama where it was processed into agricultural lime. (R.30, 46,64-67). Petitioner does not allege nor claim that any discriminatory sale of dolemite rock took place in the Middle District of Georgia, or otherwise in interstate commerce, nor are any such sales shown or claimed by Petitioner. Petitioner's interrogatory answers and the unrebutted affidavit of Respondent's president demonstrates this (R.30, 46, 64-67).

Petitioner had From December 12, 1977 until January 18, 1979, in excess of one year, to undertake and complete any discovery in support of its claim of interstate "transactions" before Respondent filed its motion for summary judgment. From that date until the Court's order on May 4th, 1979, approximately three and a half additional months, Petitioner requested no discovery informally, sought no discovery formally or under the rules of discovery and did not request the Court to delay entering any order for the purposes of undertaking discovery, etc. in order to demonstrate any interstate sales or transactions in interstate commerce.

Petitioner did not at the trial level, in its appeal to the Fifth Circuit Court of Appeals, nor in its Petition to this Court, set forth, or even allude to, any set of facts or circumstances to show that Respondent made any sale of dolemite rock in interstate commerce or that there was any "transaction" in interstate commerce prohibited by the Robinson-Patman Act.

(f)
SUMMARY OF ARGUMENT

Since the argument of Respondent will not exceed twenty (20) pages in length, no summary of argument will be set forth.

(g)

ARGUMENT AND CITATION OF AUTHORITY

The Petition for Writ of Certiorari is defective and should be denied for the reason that Petitioner utterly fails to describe either by fact or conclusion the "transaction."

The pleadings, interrogatories propounded by Respondent to Petitioner and Petitioner's answers, and the affidavit of Respondent's president in the District Court (R. 30, 46, 64) clearly show that there were no sales of dolemite rock by Respondent in interstate commerce.

A plaintiff in a claimed violation of §13(a) of the Robinson-Patman Act must allege and prove subject matter jurisdiction; i.e. that one of the discriminatory sales be in interstate commerce and to be in interstate commerce, the sale must be made across a state line.

Petitioner has seized upon the word "transaction" as used by the Court in *Gulf Oil Corporation* v. *Copp Paving Co.*, 419 U.S. 186, 42 L.Ed.2d 378, 95 S.Ct. 392 to imply that there is some mysterious activity carried on by Respondent in the sale of dolemite rock which violates the Robinson-Patman Act. Petitioner does not give this Court nor did it give the District Court or the Fifth Circuit Court of Appeals even a hint of its factual claim as to what constitutes such transaction. It is clear that there must be a "sale" in interstate commerce. This Court said in *Copp Paving* at 419 U.S. 195; 42 L.Ed.2d 387 "unless it appears...that at least one of Industrial's allegedly discriminatory sales was made in interstate commerce (§2[a]), Copp's claim must fail."

This Court, after lengthy discussion, considered and rejected the "Nexus to commerce" argument propounded in *Copp Paving* at 419 U.S. 197; 42L.Ed.2d 388, specifically noting the narrow and restrictive language and interpretation of §2(a) of the Robinson-Patman Act. Respondent submits that it is the same "nexus to commerce" approach that Petitioner is taking when it attempts to distinguish "transactions" in interstate commerce from "sales" in interstate commerce, the latter term

requiring the subject matter of the sale to "cross state lines." *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (1973, 5th Cir.); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (1969, 5th Cir.); *Walker Oil Co.* v. *Hudson Oil Co.*,414 F.2d 588 (1969, 5th Cir.); *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (1969, 5th Cir.).

While some of the Fifth Cricuit decisions cited above, at places, use the term "transactions" generically, they use the term "sales" in interstate commerce specifically. *Copp Paving* uses the two terms in the same manner. For instance see *Cliff Food Stores, Inc.* v. *Kroger, Inc., supra* at pages 208 and 209:

> "Under the terms of Section 13(a), however, at least one of the *sales* alleged to be discriminatory must actually be in interstate commerce." (Emphasis added)
>
> That is, ****at lease one of the two *transactions* which, when compared, generate a discrimination must cross a state line." (Emphasis added)

The Statute itself uses the word "purchases."

Respondent originally and has consistently said "sale" in interstate commerce. The District Court said "sale"; the Fifth Circuit said "sale."

> "Thus, notwithstanding that Appelee is itself 'engaged in commerce' the jurisdiction under the Statute depends additionally on the existence of a *sale* 'in commerce' of dolemite rock or a commercially fungible product, cf. *Fred Meyer, Inc.* v. *F.T.C.*, 359 F.2d 351, 359 (9th Cir., 1966); Rev., D. on other grounds, 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968), with which Appelee's *sales* to Appellant can be compared. And it is here that Appellant's case falls down." (Emphasis added) *S & M Materials Company* v. *Southern Stone Company, Inc., supra.* Division [4] Page 3397.

Even if *Copp Paving* were contra to Respondent's position, which it is not, it is distinguishable on the facts:

> A. Copp's sole claim for jurisdiction was based on the fact that asphalt was used on the interstate highway system (P. 384 L.Ed., Col. 2, L. 16-25).
>
> B. Copp did not claim that Industrial and Sully-Miller made interstate sales (P. 387 L.Ed., Col. 1, L. 22-26).

The holding in *Copp Paving* was simply that the sales to interstate highway contractors were not sales "in commerce as a matter of law" (P. 389 L.Ed., Col. 1, L. 23-28).

The Fifth Circuit in *Littlejohn, (supra), Cliff Food Stores, Inc., (supra), Walker Oil Co., (2704a), Hiram Walker, Inc., (supra)* has unequivocally held that alleged discriminatory sales must cross a state line following the rule made in this Court. *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 95 L.Ed.2d 44 (1951). These cases were cited, approved and adopted by this Court in *Copp Paving*. Petitioner has at no time in the Trial Court, the Fifth Circuit or in this Court set forth any contentions, much less facts, which constitutes even one sale in interstate commerce of the alleged discriminatory product, i.e. dolemite rock.

The Fifth Circuit Court of Appeals in *Walker Oil Co.* v. *Hudson Oil Co. (supra)* which this Court cited with approval in *Copp Paving*, said in Division [1]:

> "In the instant case by the sales by the two retail gasoline stations are local, intrastate retail sales. They are made not to known or specific customers but rather to whatever random purchasers may wander in desiring to purchase gasoline at the set price . . . the sales themselves did not cross a state line and hence are not 'in commerce' within the meaning of the Robinson-Patman Act . . .

> The instant sales were made by merchants who offered their wares for sale to the trade or public at large, after the flow of interstate commerce ended and the goods came to rest within the state."

Judge Brown, a member of the panel for the Fifth Circuit Court of Appeals in the instant case, in a concurring opinion in the *Walker Oil Co.* case recognized that though there may be a repetition of an outworn test, there still is a requirement of "Physical movement in interstate commerce" to satisfy the test of the sale "crossing state lines."

Petitioner misapplies the holding of this Court in *Copp Paving* by lifting from that decision the term "transaction" and attempting to apply that term to something other than "sales." In referring to "transactions in interstate commerce," the Court was clearly referring to "sales in interstate commerce." Petitioner persists in misapplying this term in its argument to this Court to grant Certiorari that:

> "There are enumerable businesses throughout the nation conducting business across State lines on a daily basis but whose commodity does not cross a State line. They send out their agents across a State line and they utilize the telephone and mail service."

This is the same "nexus to commerce" argument that this Court rejected in *Copp Paving*. This Court clearly established in *Standard Oil Co.*, v. *F.T.C. (supra)* that the "sales . . . must have been made in interstate commerce" (273), and refers to the "flow of the product" of the sale.

CONCLUSION

Even if this case involved questions of such gravity and importance to the general public and "businesses throughout the nation . . . who send their agents across a State line and . . . utilize the telephone and mail service" as Petitioner suggests at Page 6 of its brief, this Court has clearly rejected such activity as the test for subject matter jurisdiction under the Robinson-

Patman Act in *Gulf Oil Corporation* v. *Copp Paving (supra)* and *Standard Oil Co.* v. *F.T.C. (supra).*

Even though Petitioner alludes to such activity as sending agents across state lines, utilization of the telephone service, etc. it has failed at any stage of these proceedings to show or set forth any facts or circumstances which it contends constitutes "transactions" in interstate commerce that are involved in this case. For this reason alone, the Petition for Writ of Certiorari should be denied and summarily dismissed.

Additionally the United States Court of Appeals for the Fifth Circuit has not rewritten any rule or adopted any new and narrow rule, as Petitioner suggests at Pages 6 and 7 of its brief. This Court, and the Fifth Circuit Court of Appeals decisions which this Court has approved and adopted have recognized that for sales to cross state lines, the product must at some stage necessarily cross a state line to be in the flow of commerce.

The Petition for Certiorari presents nothing for this Court to review but on the contrary, submits as a basis for subject matter jurisdiction under the Robinson-Patman Act a theory which this Court has long since rejected.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I do hereby certify that I have served Petitioner with three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari by mailing three copies of same, postage prepaid and properly addressed to Mr. Charles A. Gower, Attorney at Law, P. O. Box 2148, Columbus, Georgia 31902.

This 30th day of May, 1980.

William B. Hardegree

William B. Hardegree